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Nos. 77-999 and 77-5991

In the Supreme Court of the United States

OCTOBER TERM, 1977

REUBEN HELFER, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR GENTRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-47)[1] is reported at 563 F. 2d 836.

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[1] "Pet. App." refers to the appendix to the petition in No. 77-5991.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1977. A petition for rehearing and a suggestion for rehearing *en banc* were denied on December 15, 1977. The petitions for a writ of certiorari were filed on December 29, 1977, in No. 77–5991 and on January 13, 1978, in No. 77–999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's closing argument denied petitioner Gentry a fair trial.

2. Whether the trial court abused its discretion in refusing to grant a severance to petitioner Helfer.

3. Whether the trial court properly instructed the jury with respect to the requirement that a gambling operation under 18 U.S.C. 1955 must be in "substantially continuous operation" for more than 30 days.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioners were convicted of conspiring to conduct the affairs of an enterprise affecting commerce through a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c), and of participating in the operation of an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioner Gentry was also convicted of using extortionate means to collect a gambling debt, in violation

of 18 U.S.C. 894.[2] Petitioner Gentry was sentenced to concurrent five-year prison terms on the substantive offenses and to five years' subsequent probation on the conspiracy charge. Petitioner Helfer was fined $1,000 on the gambling charge and was sentenced to five years' probation on the conspiracy charge. The court of appeals reversed both petitioners' conspiracy convictions, and it reversed petitioner Gentry's conviction under 18 U.S.C. 1955. Petitioner Helfer's gambling conviction under 18 U.S.C. 1955 and petitioner Gentry's extortion conviction under 18 U.S.C. 894 were affirmed.

The evidence at trial is detailed in the opinion of the court of appeals (Pet. App. 3–9). Briefly, the evidence showed that petitioners and others were associated with a gambling operation headed by Robert Fox. From September 1974 to May 1975, Fox conducted weekend dice and card games in the basement of his home (Tr. 1152–1154). From March to

[2] Convicted with petitioners on the conspiracy charge were ten co-defendants, several of whom were also convicted of the gambling offenses. Other charges, in which petitioners were not named, included assault with a deadly weapon upon a federal law enforcement officer (18 U.S.C. 111 and 1114) and conduct of an enterprise affecting interstate commerce through a pattern of racketeering activity or through collection of an unlawful debt (18 U.S.C. 1962(a) and (c)).

Marvin Hornstein, convicted of conspiracy, both gambling charges, and the assault charge, has also petitioned for a writ of certiorari (No. 77–6052). The United States has waived response to that petition.

May of 1975, petitioner Helfer worked for Fox, dealing blackjack and playing poker (Tr. 1156, 1163). The profit from a weekend of gambling would vary, but the evidence showed that in the course of one evening, the house took in four to five thousand dollars at the blackjack table alone (Tr. 253).

Petitioner Gentry's extortion conviction under 18 U.S.C. 894 was based on an incident on February 13, 1975, when he accompanied Fox and five of Fox's associates to a health spa owned by Donald Nance, who owed Fox a $400 gambling debt. Fox had previously threatened Nance in connection with the debt. At the spa, Fox and two of his confederates assaulted and threatened to kill an undercover FBI agent who was posing as a friend of Nance's. Fox subsequently instructed Nance to pay the debt at Fox's place of business (Pet. App. 5–6). Gentry had admitted before the grand jury that he had accompanied Fox on the visit to Nance's health spa, knowing that the purpose of the visit was to collect the debt (Pet. No. 77–5991, p. 6).

ARGUMENT

1. Petitioner Gentry contends that the government's closing argument was improper in several respects.

a. In arguing that the gambling operation was intended to make a profit, the prosecutor referred to certain "loaded" dice that FBI agents had seized from Fox's home while executing a search warrant (Tr. 1292–1296). During closing argument, the prosecutor said, "now they have these altered dice which they must have used" (Tr. 1618).

Petitioner Gentry contends (Pet. No. 77–5991, pp. 9–10) that the trial court should not have allowed the prosecutor to make this comment because there was no evidence that any of the defendants had actually used the dice, as the trial court acknowledged.

The court, however, had ruled that the loaded dice were admissible to show that the gambling in Fox's basement was run as a business and not as a purely social function (Tr. 1072). While there was no direct evidence establishing that the dice were actually used, it was proper for the government to invite the jury to draw the reasonable inference that they were used from the fact that they were found in Fox's home (Tr. 1618). See *United States* v. *Fidanzi*, 411 F. 2d 1361 (C.A. 7), certiorari denied, 396 U.S. 929.

b. Petitioner Gentry also contends (Pet. No. 77–5991, pp. 8–9) that the prosecution improperly commented on his failure to testify in his own defense by noting that certain of the defendants "didn't * * * want to answer [his] questions." Examination of the challenged comments, however, reveals that the prosecutor was referring to the non-responsive answers given by those defendants who *did* testify;[3] he was

[3] The relevant portion of the argument is as follows (Tr. 1651–1652):

"Of course, some of these defendants don't know what I mean by 'work.' 'Mr. Jamerson, what do you mean by 'work,' what do you mean by 'collect,' what do you mean by 'compensate?' Those are pretty simple words, ladies and gentlemen. It is not something you need a dictionary to look up. Mr. Jamerson and some of the other defendants, they didn't want to answer my questions. Why didn't they want to answer my questions? Because if they told the truthful answer, they knew it would show them to be guilty."

not commenting on the silence of the non-testifying defendants. Those defendants who chose to testify put the issue of their credibility directly before the jury, and the prosecutor was fully entitled to comment on it.[4]

c. Petitioner Gentry finally contends (Pet. No. 77–5991, pp. 4–8) that the government misstated the evidence with regard to his involvement in the extortion incident by suggesting that he had admitted his conscious involvement in the extortion scheme in the course of his testimony before the grand jury. Again, however, petitioner misconstrues the prosecutor's remarks. One of the government's witnesses at trial testified that Fox had telephoned petitioner Gentry before the incident at the health spa and had told him that "they was going down [to] the health spa and put the muscle on this guy" (Tr. 1189). During his closing argument, the prosecutor said: "I think you have gathered from the testimony in this case that Mr. Fox called Art Gentry that morning." He then added: "He already said in his testimony that Mr. Gentry knew they were going down to put the muscle on the guy" (Tr. 1772–1773). This statement obviously referred to the witness's testimony at trial, not to petitioner Gentry's statements before the grand jury.

2. Petitioner Helfer contends (Pet. No. 77–999, pp. 9–17) that the trial court erred in denying his motion

[4] It is thus not necessary to hold this case pending the disposition of *Lockett* v. *Ohio*, No. 76–6997, certiorari granted, October 11, 1977, which raises the issue whether a prosecutor's comment on the uncontradicted nature of the government's case constitutes an impermissible reference to defendant's failure to testify.

for a separate trial. The joint trial was prejudicial to him, he claims, because evidence of substantive offenses introduced against other defendants was necessarily imputed to him.

The initial joinder of all the defendants in this case was, however, clearly proper under Fed. R. Crim. P. 8(b), which allows joinder of co-defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or offenses." All ten defendants were charged as co-conspirators, and it is well settled that the presence of a conspiracy count renders joinder appropriate under Rule 8, at least in the absence of a showing of bad faith on the part of the government in framing the indictment. *Schaffer* v. *United States*, 362 U.S. 511, 513–514; *Baker* v. *United States*, 393 F. 2d 604, 607 (C.A. 9); *United States* v. *Manfredi*, 275 F. 2d 588, 593 (C.A. 2).[5]

[5] The cases relied on by petitioner Helfer to support his claim that joinder was improper under Rule 8(b) are inapposite. In *United States* v. *Whitehead*, 539 F. 2d 1023 (C.A. 4), the two defendants were not charged with conspiracy, but with separate substantive offenses. The only link between the two offenses was that they were both allegedly committed in concert with the same third party. That was not enough, the court found, to support joinder under Rule 8(b). Similarly, in *United States* v. *Levine*, 546 F. 2d 658 (C.A. 5), the court found misjoinder in a case in which the indictment on its face charged two separate conspiracies rather than one overall conspiracy. While reversing the convictions, the court recognized that where, as here, the indictment charges only a single conspiracy, joinder is appropriate. See *United States* v. *Gentile*, 495 F. 2d 626 (C.A. 5); *United States* v. *Cruz*, 478 F. 2d 408 (C.A. 5), certiorari denied *sub nom. Aleman* v. *United States*, 414 U.S. 910.

Alternatively, petitioner Helfer argues that the trial court abused its discretion by denying his motion for a severance under Fed. R. Crim. P. 14. It is well settled that evaluating the need for a severance in a particular case is peculiarly within the competence of the trial court and that the denial of a severance will be upset only in the case of a clear abuse of discretion. *Opper* v. *United States,* 348 U.S. 84, 95; *United States* v. *Leonard,* 494 F. 2d 955 (C.A. D.C.); *United States* v. *Martinez-Villanueva,* 463 F. 2d 1336 (C.A. 9), certiorari denied, 409 U.S. 915. Petitioner argues that the disparity between the evidence against him and the evidence against other defendants was so great that he was necessarily prejudiced by being tried together with his co-defendants.

In fact, however, the evidence showed that petitioner Helfer worked as a blackjack dealer in Fox's casino from March through the time it was raided in early May (Tr. 263–267, 1103–1106); that he had relayed messages to other gamblers on Fox's behalf (Tr. 946–948); that he had helped design the layout of the craps table in the casino (Tr. 1165); and that he had successfully investigated a suspected undercover police agent at Fox's request (Tr. 769–773, 975–976). Petitioner Helfer was thus not simply a marginal figure in the criminal scheme; he was one of a small core group that helped Fox operate his casino over an extended period during the Spring of 1975. Accordingly, this is not a case like *United States* v. *Kelly,* 349 F. 2d 720, 756–759 (C.A. 2), or *United States* v. *Donaway,* 447 F. 2d 940, 943 (C.A. 9), in

which the courts held that severance should have been granted because a very thin case against one defendant was unfairly bolstered by "spill-over" from the proof against much more clearly culpable defendants.

Finally, petitioner's suggestion that the reversal of his conspiracy conviction makes the initial joinder improper is groundless. Even when the trial court dismisses the charge that originally justified joinder prior to submission of the case to the jury, the court is not required to grant a severance. *Schaffer* v. *United States, supra. A fortiori,* a later reversal of the charge on which joinder was based does not establish misjoinder unless the defendant can show prejudice or bad faith on the part of the government in charging the conspiracy. *United States* v. *Brown,* 555 F. 2d 407 (C.A. 5), certiorari denied, February 27, 1978, Nos. 77–592, 77–5448 and 77–5456; *United States* v. *Ong,* 541 F. 2d 331, 337 (C.A. 2), certiorari denied, 429 U.S. 1075; *Peterson* v. *United States,* 405 F. 2d 102, 106 (C.A. 8), certiorari denied, 395 U.S. 938. In this case, petitioner makes no suggestion of bad faith on the part of the government, and, as discussed above, he has made no showing of prejudice under Rule 14.

3. Finally, petitioner Helfer contends (Pet. 17–20) that the jury might have found that the casino gambling was not in "substantially continuous operation" for a period in excess of 30 days, as required by the statute, if the trial court had not referred to bookmaking in its instructions to the jury on Count I. As the court of appeals noted (Pet. App.

12), the challenged instruction was merely the court's recitation of the statutory definition of the term "gambling" in 18 U.S.C. 1955. The instruction did not direct the jury to consider bookmaking activities in determining whether the casino was in "substantially continuous operation" for a period in excess of 30 days. Indeed, the court specifically referred to "the gambling business *alleged in Count I of the indictment*" (Tr. 1811; emphasis added) when instructing the jury that the business had to have been in operation for a period of 30 days or more in order to be in violation of the statute. The court's instruction on the element of continuous operation was therefore not erroneous.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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